WATER QUALITY **PERMITS**

Policies & Procedures

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401 CERTIFICATION OF 404 AFTER-THE-FACT PERMIT APPLICATION

Purpose:

To assist Water Quality Control Division personnel in the review and 401 Certification of 404 after-the-fact permits, and improve other agencies' and the public's understanding of the procedures and criteria used.

Policy/Procedure: All public notices or applications for 404 after-the-fact permits will be reviewed for 401 Certification under the requirements and specifications of Section 401 of the Federal Clean Water Act, the Colorado Water Quality Control Act and the Colorado Water Quality Control Commission's "Regulations for the Certification of Federal Licenses and Permits". The following guidelines shall also be followed:

- 1) If the division discovers or is informed that the unauthorized discharge of dredged or fill material has significantly violated numeric or basic stream standards, certification for that discharge shall be denied.
- 2) If any conditions which would have ordinarily been attached to the certification for the after-the-fact activity, and which apply to that activity, have not been met by the prospective permittee, certification for that activity shall be denied.
- Under ordinary circumstances, it is incumbent upon 404 applicants to provide the division with reasonable assurance that they will not significantly violate numeric or basic stream standards. Similarly, it is incumbent upon after-the-fact applicants to provide assurance that standards were not significantly violated. In instances when the division is not certain standards were not significantly violated, certification shall be denied.
- 4) Whether or not the applicant had knowledge of the 404 program should be considered. Prior or repeat offenders should receive a more complete and detailed review to insure standards have not and will not be violated.

- 5) Any final decision must be economically reasonable. Some of the factors that should be considered are:
 - a) need for the discharge to have occurred prior to authorization, such as in emergency flood-fighting operations,
 - value of discharge in protecting or preventing loss of life or property,
 - c) costs associated with investigation of effects of or circumstances related to the discharge.
- 6) Division staff shall limit their involvement in the investigation, analyses, or administrative duties associated with the review and processing of after-the-fact certifications and appeals of final 401 decisions to that amount of time budgeted for such duties. The Division of Wildlife, U.S. Fish and Wildlife Service, E.P.A. or other agencies or parties having expertise is assessing impacts to aquatic life or other beneficial uses of waters of the state should be consulted regarding such impacts, and will normally submit comments to the Corps of Engineers. Final enforcement actions should only be taken by the Corps or E.P.A.
- 7) Denial of 401 Certification may in turn require removal of the illegally discharged dredged or fill material. The water quality impacts of such removal may themselves be as or more significant than those of the original placement. In such cases it may be more appropriate to coordinate actions with other reviewing agencies, the Corps and the applicant in order to develop an agreement that would minimize any further disturbance to the stream and provide compensation for any injury to beneficial uses.

Background:

The unauthorized discharge of dredged or fill material occurs regularly. There have been instances where such discharges have drawn other agencies' and the public's attention and have been relatively controversial. As there are no specific provisions for the certification of after-the-fact permits in the Commission's regulations, this policy is designed to provide concise and consistent certification processing for such unauthorized discharges. This should minimize the chance of making decisions that would result in water quality degradation or that would be overturned upon appeal.